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UNEQUAL BARGAINING POWER: MAKING THE NATIONAL LETTER OF INTENT MORE EQUITABLE

The same ritual occurs every year. Coaches travel all over the country in hopes of recruiting a star athlete that can help their program achieve success. Prospective student-athletes travel to various campuses to decide which institution's program will be the best fit for them. They speak to current players, students, and coaches — all of whom tell them this institution is the best place for them to be next fall. The coach shows off some new or storied athletic facility and the great accommodations for athletes. The coach promises them the world: that over the next four or five years they will become a star, be ready for the pros, or get into the academic program they want. The culmination of this ritual is the commitment of the prospect to the institution through the signing of the National Letter of Intent (NLI) and the scholarship letter.¹ Generally, both the institution and the prospect benefit from this relationship, but sometimes something else happens. The promises do not come true, the athlete does not play, or the coach leaves the institution. In almost all of these cases, there is little the athlete can do about the situation. This comment will explore why those situations happen and what the National Collegiate Athletic Association (NCAA) can do to help student-athletes.

I. THE NATIONAL LETTER OF INTENT PROGRAM

The NLI is an agreement between the institution and the prospect that the prospect will attend that institution for one year and will be provided with a financial aid award.² The NLI system began in 1964 and has undergone extensive changes since then.³ At that time, the program was used by seven conferences and eight independent institutions.⁴ Currently, the NLI is used by fifty-seven conferences and over five hundred institutions to offer athletic

1. COLLEGIATE COMMISSIONERS ASSOCIATION, TEXT OF THE NATIONAL LETTER OF INTENT, NATIONAL-LETTER.ORG, at http://www.national-letter.org/guidelines/nli_text.php (last visited Nov. 23, 2004) [hereinafter *NLI Text*].

2. *Id.*

3. COLLEGIATE COMMISSIONERS ASSOCIATION, OVERVIEW: WHAT IS THE NLI?, NATIONAL-LETTER.ORG, at <http://www.national-letter.org/overview/> (last visited Nov. 23, 2004) [hereinafter *NLI Overview*].

4. *Id.*

scholarships.⁵ The program is used by all schools except those institutions that do not offer athletic scholarships: the Ivy League, the Patriot League, and the service academies.⁶ Since its inception, the program has been run by the Collegiate Commissioners Association (CCA), not by the NCAA.⁷ The CCA has operated out of the Southeastern Conference (SEC) since 1995.⁸

The original Letter of Intent was designed with the same goals in mind as today's program: "[t]o reduce and limit recruiting pressure on student-athletes; and [t]o promote and preserve the amateur nature of collegiate athletics."⁹ In 1964, the Letter of Intent was two pages and did not deal with the needs of all sports.¹⁰ The CCA amended the NLI in 1973 in response to its growing use by conferences and institutions and to accommodate the various sports involved.¹¹ The NLI finally expanded to its current four-page format in 1991.¹² The current format combines men's and women's sports and the rules and interpretations into one document.¹³ The NLI is sent out to recruits from the institution along with the athletics financial aid award during one of the signing periods.¹⁴ There are two signing periods for every sport with the exception of field hockey, soccer, and men's water polo.¹⁵ All other sports operate with an early signing period in November and a late signing period beginning in April.¹⁶ Letters of Intent may be signed only during these periods; otherwise, they are not valid.¹⁷ The prospect has either the length of the early signing period or fourteen days from issuance of the NLI to sign the NLI or it expires.¹⁸ Once the prospect signs the NLI, he or she is bound to that institution, the recruiting process ceases, and all other institutions are barred

5. COLLEGIATE COMMISSIONERS ASSOCIATION, MEMBER CONFERENCES, NATIONAL-LETTER.ORG, at <http://www.national-letter.org/conferences/> (last visited Nov. 23, 2004) [hereinafter *NLI Conferences*].

6. Pete Diprimio, *National Letters of Intent Under Fire*, ST. LOUIS POST-DISPATCH, July 13, 2003, at D12.

7. COLLEGIATE COMMISSIONERS ASSOCIATION, HISTORY OF THE NLI, NATIONAL-LETTER.ORG, at <http://www.national-letter.org/history/> (last visited Nov. 23, 2004) [hereinafter *NLI History*].

8. *Id.*

9. *NLI Overview*, *supra* note 3.

10. *NLI History*, *supra* note 7.

11. *Id.*

12. *Id.*

13. *Id.*

14. *NLI Text*, *supra* note 1.

15. COLLEGIATE COMMISSIONERS ASSOCIATION, SIGNING DATES, NATIONAL-LETTER.ORG, at <http://www.national-letter.org/dates/> (last visited Nov. 23, 2004) [hereinafter *NLI Signing Dates*].

16. *Id.*

17. *Id.*

18. *NLI Text*, *supra* note 1.

from contacting or recruiting the prospect.¹⁹ The prospect is then bound to the institution for a period of one year and must end all his or her recruiting contacts with other universities.

The end of the recruiting process with the signing of the NLI binds the institution and the recruit through a bilateral contract, which has a duration of one year.²⁰ In the case of the prospect-institution relationship, the contract documents are the NLI and accompanying athletics financial aid award.²¹ The NLI and athletics financial aid award meet the basic criteria of a contract, which are that there is an offer, an acceptance, and consideration.²²

The institution begins the process by making the offer to the prospect in the form of a scholarship.²³ This scholarship must be an athletics award to attend the institution and is required²⁴ because the language contained in the NLI states that alone it is not a contract; it requires the offer of athletics financial aid.²⁵ The NLI is not a scholarship offer, but the athlete is told that "[a]t the time I sign this NLI, I must receive a written offer of athletics financial aid The offer shall list the terms and conditions of the award, including the amount and duration of the financial aid."²⁶ Thus, without the financial aid award, the contract is not complete.²⁷ The acceptance is the signing of the NLI by the prospect and his or her legal parent or guardian during the proscribed period and sending the documents to the institution.²⁸

Finally, the signing of the NLI meets the test for consideration.²⁹ Consideration between the prospect and the institution occurs first from the institution's point-of-view.³⁰ The institution must suffer a legal detriment: it must give up something that induces the prospect's promise to attend the university.³¹ In this case, the university is providing athletic financial aid that it does not have to provide, which also prevents it from giving an athletic

19. *Id.*

20. Michael J. Cozzillio, *The Athletic Scholarship and the College National Letter of Intent: A Contract by Any Other Name*, 35 WAYNE L. REV. 1275, 1287-1310 (1989). This article provides an in-depth analysis of the NLI as a contract.

21. *Id.* at 1312.

22. *Id.* at 1293-1310.

23. *Id.* at 1311-16.

24. *NLI Text*, *supra* note 1.

25. *Id.*

26. *Id.*

27. Cozzillio, *supra* note 20, at 1312.

28. *Id.* at 1316-20. See also *NLI Text*, *supra* note 1.

29. Cozzillio, *supra* note 20, at 1338.

30. *Id.* at 1339.

31. *Id.*

award to another prospect.³² Second, the acceptance is made because of the detriment; here, the prospect is induced to sign because of the financial award.³³ Finally, the promise by the prospect to attend induces the institution's detriment of giving the scholarship.³⁴ From the prospect's side, consideration occurs because the student is under no obligation to otherwise attend the institution and attendance at that institution prevents the student from attending another.³⁵ Second, the prospect's detriment induces the institution's promise to give an athletic award.³⁶ Finally, the prospect knowingly accepts the offer made by the institution, satisfying the third prong of consideration.³⁷ With an offer, acceptance, and consideration, the NLI and athletics award constitute a valid contract.

The courts have generally accepted that student-athletes and universities do have a contractual relationship.³⁸ In *Jackson v. Drake University*, the court found that "[t]he financial aid agreements entered into by [the recruit] constitute valid contracts."³⁹ The contractual agreement is for one year and consists of the NLI and the scholarship agreement from the institution. The NLI text also contains the terms under which the NLI is signed and the obligations of both the institution and the prospect.⁴⁰ The only obligations of the university are to properly file the paperwork and to provide the accompanying "written offer of athletics financial aid."⁴¹ The remainder of the NLI deals with the obligations of and restrictions on the student-athlete.⁴² The prospect is obligated to attend the university for one year, but the NLI does not deal at all with his or her participation in athletics.⁴³ The scholarship agreement contains the remaining terms included in the contract, including the length and the clause that all institution and conference rules must be followed.⁴⁴ This contract contains no additional terms regarding the promises

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 1340.

36. *Id.*

37. *Id.*

38. See *Jackson v. Drake Univ.*, 778 F. Supp. 1490, 1493 (S.D. Iowa 1992); *Ross v. Creighton Univ.*, 957 F.2d 410, 415-17 (7th Cir. 1992).

39. *Jackson*, 778 F. Supp. at 1493.

40. *NLI Text*, *supra* note 1.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Taylor v. Wake Forest Univ.*, 191 S.E.2d 379, 382 (N.C. Ct. App. 1972).

made by a coach or university during the recruiting process.⁴⁵

II. DO ORAL PROMISES MEAN ANYTHING?

There have been instances of athletes suing the institution, claiming that promises made by the coach or the university during the recruiting process were a contract and were breached. One prominent case was that of Brian Fortay. In 1993, Fortay sued the University of Miami for breach of contract, among other claims.⁴⁶ He claimed that he signed his NLI and scholarship offer because of the promises he alleged the coach made: that he would be the starting quarterback and the football team would be built around him.⁴⁷ Shortly after he signed, the coach who had recruited him, Jimmy Johnson, left and was replaced by Dennis Erickson.⁴⁸ Fortay claimed that the new coach persuaded him to stay at Miami by assuring him that he would be the starter in a "system better suited for entry into the NFL."⁴⁹ Miami also refused to release Fortay from his letter of intent; therefore, transferring would have cost him two years of eligibility.⁵⁰ After Fortay enrolled at Miami, he "red-shirted" for two years and then became a backup.⁵¹ Eventually, Fortay chose to transfer to Rutgers and lose a year of eligibility rather than remain as a backup at Miami behind a quarterback he had outperformed in competitions.⁵² In 1996, Fortay and Miami settled the case out of court.⁵³

Since Fortay and Miami chose to settle out of court rather than continue with litigation, it is not clear if he would have prevailed on any of his claims. It is, however, a classic example of the kinds of promises coaches make to prospects during the recruiting process. Most of these cases do not make it to court or do not become of huge media interest. The only ones harmed in this process are the athletes. If the athlete does not bring the issue to court, the institution loses nothing. If the athlete stays, the school is not bound to

45. *Id.*

46. Fortay v. Univ. of Miami, CIV. A. No. 93-3443, 1994 WL 62319, at *1 (D.N.J. Feb. 17, 1994).

47. *Id.* at *4.

48. *Id.*

49. *Id.*

50. *Id.* See also *NLI Text*, *supra* note 1.

51. Fortay, 1994 WL 62319, at *4-5.

52. *Id.* at *5.

53. James Kennedy Ornstein, Comment, *Broken Promises and Broken Dreams: Should We Hold College Athletic Programs Accountable for Breaching Representations Made in Recruiting Student-Athletes?*, 6 SETON HALL J. SPORT L. 641, 642 (1996).

continue giving him or her a scholarship after the first year.⁵⁴ If the athlete transfers, the coach no longer has to deal with an unhappy player and has an additional scholarship to give.⁵⁵ In the case of Fortay, the 1991 Miami team went on to win the national championship.⁵⁶ The quarterback who replaced him, Gino Torretta, went on to win the Heisman Trophy in 1992⁵⁷ and was drafted by the Minnesota Vikings in the 1993 NFL Draft.⁵⁸

One reason Fortay might have wished to settle is that no guarantees are given if the prospect meets the requirements of the NLI, other than the one-year scholarship award.⁵⁹

The NLI is a binding agreement between a prospective athlete and an institution in which the athlete agrees to attend the institution for one full academic year in exchange for athletic financial aid for that year The NLI does not guarantee the athlete a place on the sports team, nor does it guarantee playing time.⁶⁰

That is all the NLI is — an agreement that the institution will provide financial aid so long as the athlete attends the institution for the full academic year.⁶¹ There are no promises of starting or of building the team around one player, and there are no promises that the player will even get to play or that the recruit can be built into a professional caliber player.⁶²

The courts have been unwilling to read any protected interests into the agreements other than the financial interest in a one-year scholarship.⁶³ The institution is obligated to provide the financial aid offered in the financial

54. NCAA rules require that scholarships only be for one year and renewable for up to five years. The institution may not renew the scholarship so long as written notice is given to the athlete on or before July 1 prior to the academic year. See NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, 2003-04 NCAA DIVISION I MANUAL 201-03, Bylaws 15.3.3-15.3.5 (2003) [hereinafter DIVISION I MANUAL].

55. *Id.*

56. University of Miami, 1991 (12-0-0): Gino, the Ruthless Posse and Wide Right I, COLLEGESPORTS.COM, at <http://hurricanesports.collegesports.com/sports/m-footbl/archive/043002aae.html> (last visited Nov. 23, 2004).

57. College Sports Online, Heisman Winners, COLLEGESPORTS.COM, at <http://heisman.collegesports.com/winners/hsmn-winners.html#winners-year> (last visited Nov. 23, 2004).

58. National Football League, 1993 NFL Draft, NFL.COM, at <http://www.nfl.com/draft/history/years/1993> (last visited Nov. 23, 2004).

59. *NLI Overview*, *supra* note 3.

60. Michael J. Riella, Note, *Leveling the Playing Field: Applying the Doctrines of Unconscionability and Condition Precedent to Effectuate Student-Athlete Intent Under the National Letter of Intent*, 43 WM. & MARY L. REV. 2181, 2186-87 (2002).

61. *Id.* at 2187.

62. See *Hysaw v. Washburn Univ.*, 690 F. Supp. 940, 946-47 (D. Kan. 1987).

63. See *id.*

award, and the recruit is obligated to attend the institution for one year.⁶⁴ Beyond that, the courts have found that the recruit has no property or protected interests.⁶⁵ In *Hysaw v. Washburn University*, the plaintiffs sued because they were denied the right to play football after they boycotted practice in protest of what they felt were unaddressed concerns about discriminatory treatment of black players.⁶⁶ The plaintiffs claimed that their right to play football was denied by Washburn and the coaching staff, and that this denial deprived them of a protected interest.⁶⁷ They claimed this right was protected through the scholarship documents they had signed.⁶⁸ The court determined that while they did have a property right in the scholarship, there was no protected interest in playing football.⁶⁹ The court said, "[a]ny other terms plaintiffs attempt to read into those agreements are, without supporting evidence, no more than 'unilateral expectations.'"⁷⁰ The court found that playing time was too speculative an interest to be protected.⁷¹ While the players may have expected they would play, their scholarship documents contained no promise of this.⁷² Thus, while the institution could not take away the scholarship it had promised in the award letter, there is no protected right for prospects to play or to even be on the team.

Likewise, because interpretation of the NLI is based on contract law, courts have been very unwilling to find any additional, unwritten promises in the contract. In *Hysaw*, the plaintiffs argued that besides a protected interest, Washburn had breached the contract because they were promised that they would play football during the season.⁷³ The court found no such promise in the contract, stating "the written scholarship contracts they signed make no indication of such promises. In fact, the only promises in those written contracts were that the players would receive money."⁷⁴ Despite what the court held, prospects often believe that all promises made by coaches during the recruiting process are part of the contract.⁷⁵ In order for an athlete to successfully recover for breach of contract, the athlete "must point to an

64. *NLI Overview*, *supra* note 3.

65. *Hysaw*, 690 F. Supp. at 944-45.

66. *Id.* at 942.

67. *Id.* at 944.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 946-47.

74. *Id.*

75. *Id.* at 947.

identifiable contractual promise that the defendant failed to honor."⁷⁶ To do that, the athlete must prove, first, that there was an oral contract and, second, that the contract was breached.

Oral promises made during the recruiting process are hard to prove. Oral promises and agreements in contract law are governed by the parol evidence rule.⁷⁷ The parol evidence rule serves to discharge all prior written and oral agreements that are inconsistent with the final agreement.⁷⁸ The NLI is a standardized agreement and is considered to be final because it contains all the necessary terms of the contract.⁷⁹ In the case of the NLI and financial aid award, any promises made during the recruiting process are void unless they are part of the final, written agreement. In plain language, the NLI states that "[n]o additions or deletions may be made."⁸⁰

No promises made by a coach, other than the promise of financial aid, are included in the final document.⁸¹ Although a recruit may believe everything the coach told him or her during the recruiting process in an attempt to induce an acceptance, those promises mean almost nothing. The coach is not even a party to the contract; therefore, any promises of starting or playing are treated as nothing more than talk about the program. The athlete is left with only a scholarship. A scholarship may have great value, but when faced with two or more equivalent scholarships, it is not the only reason the recruit may choose one institution over another. Without a separate agreement showing the promises made, the contract will be assumed to be complete, and any evidence of an oral agreement conflicting with the written one will be dismissed.⁸² Under this system, the coach has little incentive to avoid promising the recruit things he or she may not be able to deliver. Thus, if the recruit does not have any promises from the coach in writing, he or she has a very little chance of recovering damages. Because of all the promises made to recruits that cannot be sustained, this article will next discuss the bargaining power the recruit has.

III. BARGAINING POWER

The prospects have bargaining power when it comes to the recruiting process only in selecting which school and program they like best. As the NLI

76. *Ross*, 957 F.2d at 417.

77. RESTATEMENT (SECOND) OF CONTRACTS § 213 (1981).

78. *Id.*

79. RESTATEMENT (SECOND) OF CONTRACTS § 211 (1981).

80. *NLI Text*, *supra* note 1.

81. *Id.*

82. RESTATEMENT (SECOND) OF CONTRACTS § 213 (1981).

and scholarship awards are standardized forms, there are no terms to be negotiated and no additional conditions to be included in the contract.⁸³ The agreement is simply the college or university agreeing to give the recruit a scholarship and the opportunity to try out for the team in exchange for the student agreeing to enter the school and to participate on an athletic team.⁸⁴ The recruit's only real power is the decision whether or not to accept the offer. Once the recruit signs the NLI, he or she has no real power against the institution to enforce the promises made during the recruiting process. The recruit can, of course, always transfer, but he or she will be hit with a one-year transfer penalty.⁸⁵ This penalty requires an athlete to sit out one year after he or she transfers to the new institution.

To date, student-athletes have not fared well in their lawsuits against institutions or the NCAA for alleged unkept promises and breach of contract.⁸⁶ Chad Elsey is hoping to change that. Elsey was a student at Southern Methodist University when he was recruited as a transfer-athlete by then-Baylor coach Dave Bliss.⁸⁷ Elsey enrolled at Baylor University in 1999, and after sitting out for one year because of NCAA rules, he played for Bliss for two years.⁸⁸ The reasons why he transferred are now the subject of a lawsuit he filed in Texas on January 5, 2004.⁸⁹ Elsey alleges that while Bliss was recruiting him, Bliss found out that Elsey wanted to go to law school.⁹⁰ Elsey's suit claims that while giving him a tour of campus and showing him the law school, Bliss said to him "if you commit to me that you will come to Baylor, I will not only pay for an extra semester, but will pay for law school and any other degree that you are interested in, so long as you work diligently toward a

83. *NLI Text*, *supra* note 1.

84. *NLI Overview*, *supra* note 3.

85. DIVISION I MANUAL, *supra* note 54, at 167, Bylaw 14.5.5.

86. See *Hysaw*, 690 F. Supp. at 947 (court held that there was no breach of contract when athletes were removed from the football team because the athletes still received their scholarships); *Taylor*, 191 S.E.2d at 382 (court found that there was no wrongful termination of the athlete's scholarship when the student did not remain academically eligible); *Jackson*, 778 F. Supp. at 1493 (court held summary judgment for the university because it found that the agreement between the university and the athlete did not contain a right to play basketball); *Ross*, 957 F.2d at 415-17 (court found no breach of contract where athlete claimed breach of promise of quality of education because there was no identifiable contractual promise that was breached); *Conard v. Univ. of Wash.*, 834 P.2d 17, 26 (Wash. 1992) (breach of contract claim against university was dismissed by court after football players had scholarships revoked for misconduct).

87. Kevin B. Blackistone, *Empty Promises Part of the Game: Elsey-Bliss Tale Should Open Recruits' Eyes, Odd Lawsuit Notwithstanding*, DALLAS MORNING NEWS, Jan. 27, 2004, at 1C.

88. Jeff Miller, *Baylor, Bliss Sued by Former Player; Lawyer Says Ex-coach Denies Pledging to Ease Entrance into Law School*, DALLAS MORNING NEWS, Jan. 9, 2004, at 6.

89. *Id.*

90. Blackistone, *supra* note 87.

degree"⁹¹ and that "he had connections at the law school and gaining admittance for one of his players was 'no problem.'"⁹² Elsey further alleges that he inquired about NCAA rules violations and that Bliss contended there were ways around NCAA rules.⁹³ Bliss⁹⁴ and Baylor University are both denying Elsey's allegations and that any such promises were made.⁹⁵

Elsey subsequently enrolled in law school at the University of Tulsa⁹⁶ and is now suing to recover the costs of tuition and other expenses he says "would be covered had the contract been performed."⁹⁷ He realizes that he may have a hard time with his suit because he had nothing guaranteed in writing.⁹⁸ In court, it will become a matter of his word against the coach's word; these promises will be difficult to prove, particularly because the alleged promises would have constituted a violation of NCAA rules.⁹⁹ Without other specific evidence for Elsey to use in court to show that the alleged promises were an oral contract, he has little chance of winning his lawsuit.¹⁰⁰ Without such evidence, the court will look only to the written language of the contract.¹⁰¹ This is the problem that many recruits face after they enter the institution. While very few of these situations end up in litigation, some college athletes and parents find themselves disappointed that they based their decision on promises from a coach or an institution that can be quickly forgotten after the prospect is signed rather than for the reasons they should have.¹⁰²

While Elsey was bound only by the scholarship documents that he signed and not by an NLI, his recruiting situation is similar to those who have signed an NLI.¹⁰³ Athletes have little recourse if a situation like Fortay's or Elsey's

91. Danny Robbins & Jeff Caplan, *Player Says Bliss Was to Pay Tuition*, THE FORT-WORTH STAR-TELEGRAM, Jan. 8, 2004, at 1.

92. Tommy Witherspoon, *Former Baylor Basketball Player Sues University for Breach of Contract*, COX NEWS SERVICE, Jan. 8, 2004, available at 2004 WL 70370486.

93. *Id.*

94. Bliss has since resigned from Baylor University for improper payments and benefits given to players. The university contends that Elsey is trying to take advantage of the scandal surrounding the murder of another player. See Blackistone, *supra* note 87; Witherspoon, *supra* note 92.

95. Witherspoon, *supra* note 92.

96. Associated Press, *Elsey Says Bliss Promised Aid for Law School*, ESPN.COM, Jan. 8, 2004, at <http://sports.espn.go.com/ncb/news/story?id=1703371>.

97. Witherspoon, *supra* note 92.

98. Blackistone, *supra* note 87.

99. DIVISION I MANUAL, *supra* note 54, at 100, Bylaw 13.2.

100. See *Hysaw*, 690 F. Supp. at 947.

101. *Id.*

102. Blackistone, *supra* note 87.

103. COLLEGIATE COMMISSIONERS ASSOCIATION, FREQUENTLY ASKED QUESTIONS, NATIONAL-LETTER.ORG, at <http://www.national-letter.org/faq/> (last visited Nov. 23, 2004) (stating

occurs. If promises made by a coach do not come true, the athlete has only a few viable options, none of which are favorable to the athlete. The first one is to remain with the program for the remainder of his or her eligibility.¹⁰⁴ However, if the athlete relied on a promise such as that the team would be built around him or her or that he or she would be a starter, staying with the program is likely undesirable. Second, the athlete can leave school and transfer to another institution. To do so, the athlete must first complete the current year at the his or her institution if he or she is still bound under the NLI.¹⁰⁵ Then, the athlete will have to sit out another year after transferring.¹⁰⁶ Another option is to transfer to either a Division II or a Division III institution. For an athlete looking to play high-level college sports, these divisions will not provide the same level of competition. If the athlete desires to continue playing, none of these available options will meet his or her needs.

Without specific evidence of promises or wrongdoing by the coach, very rarely can coaches be held accountable for what they did.¹⁰⁷ What Bliss allegedly promised Elsey was against NCAA rules.¹⁰⁸ Even if the NCAA finds there was wrongdoing by the coach, this is not necessarily enough to prove that there was a contract, and the athlete gets nothing. Instead, the institution and current or future players will be punished. The sanctions could be loss of scholarships or ban from post-season play.¹⁰⁹ This will not help Elsey recover for the promises made by Bliss or hurt Bliss because the scandals surrounding Baylor render it unlikely he would be offered another coaching job soon.

IV. COACHES MOVING ON; RECRUITS LEFT BEHIND

When Roy Williams left the University of Kansas for the University of North Carolina following the 2003 NCAA Men's Basketball Tournament, he left more than just a university behind, he left recruits behind.¹¹⁰ Like the coach of any major basketball program in the country, Williams had spent much time and effort recruiting prospects to join his successful program.¹¹¹ During the early basketball signing period, Williams was able to sign four

that transfer athletes do not sign an NLI.).

104. This assumes that the institution will renew the athlete's scholarship for the following academic year.

105. *NLI Text*, *supra* note 1.

106. *DIVISION I MANUAL*, *supra* note 54, at 167, Bylaw 14.5.5.

107. Blackistone, *supra* note 87.

108. *DIVISION I MANUAL*, *supra* note 54, at 100, Bylaw 13.2.

109. *Id.* at 336, Bylaw 19.5.

110. Carol Slezak, *Left at the Altar*, CHI. SUN-TIMES, Apr. 20, 2003, at 102.

111. *Id.*

players to join his team, including two prospects that had been highly recruited by other institutions around the country.¹¹² While Williams was able to leave Kansas for his dream job at North Carolina, the athletes he had recruited were still bound to Kansas by virtue of signing their NLIs.¹¹³

College basketball is hit particularly hard by this phenomenon because of the visibility of high-profile recruits¹¹⁴ and the early signing period.¹¹⁵ The early signing period lasts for one week in November; for the incoming 2004-2005 class, it lasted from November 12 to November 19, 2003.¹¹⁶ The late signing period lasted from April 14 to May 19, 2004.¹¹⁷ Most coaching changes in college basketball do not take place until after the end of the team's season or the season-ending tournaments.¹¹⁸ Therefore, recruits who sign during the early period generally sign without any indication that the coach will be leaving. Any prospect that signs during this period and attempts to break the NLI and transfer to another school is hit with a penalty of sitting out for two years and losing two seasons of competition.¹¹⁹ A Qualified Release Agreement signed by the athlete and the original institution reduces the penalty to sitting out for one year and the loss of one season of competition.¹²⁰ The departure of a coach for any reason is generally not accepted as grounds for release from an NLI without penalty, but complete waivers have been granted because the CCA does not want to risk losing a legal challenge.¹²¹ The program is set up to make the recruiting process easier and shorter. It also

112. *Id.*

113. *Id.*

114. High-school basketball phenomenons have become big national news. In addition to the increasing pressure on seniors as to whether they will go pro or go to college, phenomenons are being followed at younger and younger ages. This can be seen in the hype that has been surrounding sixteen-year-old O.J. Mayo since he was fourteen and whether or not he will go to college. See Dave Telep, *No Time Like the Present*, SI.COM, at <http://sportsillustrated.cnn.com/basketball/college/recruiting/news/2002/10/17/telep/> (Oct. 17, 2002); CNN, *Hype Machine Goes Overdrive for O.J. Mayo*, CNN.COM, at <http://www.cnn.com/TRANSCRIPTS/0212/21/cst.11.html> (Dec. 21, 2002); Paul Daugherty, *O.J. Mayo: Don't Blame Him for All the Hype*, CINCINNATI.COM, at <http://www.cincinnati.com/preps/2003/05/04/wwwprep1a4.html> (May 4, 2003); Albert Lin, *The Next Big Thing*, SI.COM, at <http://sportsillustrated.cnn.com/basketball/college/recruiting/news/2003/07/09/ABCD/> (July 10, 2003).

115. *NLI Signing Dates*, *supra* note 15.

116. *Id.*

117. *Id.*

118. DIVISION I MANUAL, *supra* note 54, at 251, Bylaw 17.5.4.

119. *NLI Text*, *supra* note 1.

120. COLLEGIATE COMMISSIONERS ASSOCIATION, QUALIFIED RELEASE AGREEMENT, NATIONAL-LETTER.ORG, at <http://www.national-letter.org/documents/ReleaseRequest.pdf> (last visited Nov. 23, 2004).

121. Slezak, *supra* note 110.

punishes a recruit with loss of eligibility if he or she ends the process early and subsequently wants to choose another institution because the coach left before they even enrolled.

The NCAA and the CCA justify this system because of the plain language in the NLI.¹²² Paragraph 19 of the NLI states

I understand I have signed this NLI with the institution and not for a particular sport or individual. If the coach leaves the institution or the sports program, I remain bound by the provisions of this NLI. I understand it is not uncommon for a coach to leave his or her coaching position.¹²³

However, this provision ignores many realities of big-time college athletics and that recruits choose an institution in large part for the coach and the system, not simply because of the academic credentials of the institution.¹²⁴ Many commentators and coaches have commented on the reality of the prospect choosing an institution because of academics.¹²⁵ ESPN's Digger Phelps has said, "[k]ids choose a school because of the coach, . . . [a]nyone who tries to deny that isn't being realistic."¹²⁶ In fact, it is hard for many coaches to argue that recruits are choosing institutions for academics when only sixteen of the sixty-five teams in the 2004 NCAA Men's Basketball Tournament retained and graduated fifty percent or more of their freshman recruits.¹²⁷ In addition, sixteen of the teams had a graduation rate of less than twenty-five percent over four recruiting classes.¹²⁸ Gene Keady, long-time head basketball coach at Purdue University, said, "[m]ost kids today sign for the coach and not the institution. It might not be right. It might not be the philosophy of the educators, but it's the truth."¹²⁹ Roy Williams himself has said he believes recruits should be released without penalty from their NLIs if the coach leaves.¹³⁰

122. *NLI Text*, *supra* note 1.

123. *Id.*

124. *See* Diprimio, *supra* note 6.

125. *Id.*

126. Slezak, *supra* note 110.

127. Linda Fantin, *Sports, Books Tough Mix for Utah Schools; Graduation Issue: Coaches and Professors Agree That Education Is the Key, but Often That's Not How It Turns Out; Graduation Numbers Lag for Athletes*, SALT LAKE TRIB., Mar. 18, 2004, at A1.

128. *Id.*

129. Diprimio, *supra* note 6.

130. Slezak, *supra* note 110.

V. INFORMED DECISIONS?

Part of the process and philosophy behind the recruiting process is to help prospects to make an informed decision.¹³¹ If a coach leaves an institution, the current NLI system takes away the recruit's ability to make an informed decision. Many coaches agree that the prospect is and should be choosing the institution for academics as much as for athletics. Indiana University coach Mike Davis said that "[k]ids should pick the school for the right reason and that is that the school offers what you want, academically and athletically."¹³² In the perfect situation, the prospect would be able to choose the school that provided the best athletic environment for him or her *and* the best educational opportunity. However, as graduation rates for athletes, specifically basketball and football players, hover around fifty percent and the number of these underclassmen leaving school for the draft increases, having the best educational opportunity does not appear to be the number one concern.¹³³ While some of the blame for the poor graduation rates rests with athletes and their lack of dedication to their studies, some of the blame must rest with the institutions.

In order to be able to choose the environment that is best for them, prospects need to have all of the information. Part of making an informed decision is knowing who their coach will be. For all college athletes, the coach will have a very significant impact on all aspects of their time in college. During the season, players will spend up to twenty hours a week in practice and up to eight hours a week practicing during the offseason.¹³⁴ The level of happiness with the program will affect all areas of the athlete's college life. Therefore, who the coach is will always play a major role in what school the prospect attends. If the coach who recruited them and with whom they have built up a relationship leaves, athletes can be negatively impacted in both their athletic and academic pursuits. The new coach may have completely different philosophies about how athletes should train and act or place different priorities on athletics versus academics. Despite this, the athlete is still bound to the institution and the new coach. If the recruiting process is an attempt to help the recruit make an informed decision, binding players to a coach they do not know or have any relationship with takes away this ability.

131. *NLI Overview*, *supra* note 3.

132. Diprimio, *supra* note 6.

133. Fantin, *supra* note 127.

134. DIVISION I MANUAL, *supra* note 54, at 238, Bylaw 17.1.5.

VI. MAKING THE SYSTEM MORE EQUITABLE

The system currently in place puts student-athletes at a distinct disadvantage in comparison to the institution. The institution makes the decision about whether or not to make the offer of a scholarship. If an athlete is recruited by and wants to go to a certain university, he or she has little choice but to sign the NLI.¹³⁵ A prospect who does not want to sign the NLI is left with a much more uncertain future. The coach may interpret the unwillingness to sign as an indicator that the prospect will not choose that school and might give that scholarship to another player.¹³⁶ As one recruit, Andre Allen, put it, "[i]f you don't sign, it becomes a game of chance. There are a lot of angles. The coach could give that scholarship to somebody else."¹³⁷ Without the NLI and accompanying scholarship letter, there is no guarantee for the prospect that he or she will end up with a scholarship at any school.

The athletes are also not provided enough information about what they are signing. When an athlete signs an NLI, he or she assumes that everything that the coach promised will come true and that the coach will be there to make it all happen. These prospects are young, often with dreams of college and maybe professional stardom. During the recruiting process, the coach builds trust with the prospect, and the prospect often does not know any better than to believe everything the coach promises. Prospects are sent the NLI and a scholarship letter, but no one is there to provide them with the ability to make an informed decision or to help separate the big talk and built-up promises of the coaches from what the athlete is actually contracting for when the letter is signed. The plain text of the NLI is easy to comprehend, but prospects are lacking information on what is not included.¹³⁸ The *NCAA Guide for the College-Bound Student-Athlete* provides minimal information to prospects about the NLI process.¹³⁹ The guide gives the signing dates for the NLI and directs all questions to the NLI office.¹⁴⁰ Likewise, the NCAA's "Frequently Asked Questions" on its website provides no additional information about

135. The NLI program is technically a voluntary program, as neither the prospect nor the institution is required to participate. See *NLI History*, *supra* note 7.

136. Diprimio, *supra* note 6.

137. *Id.*

138. *NLI Text*, *supra* note 1.

139. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, 2002-2003 GUIDE FOR THE COLLEGE-BOUND STUDENT-ATHLETE: NATIONAL LETTER OF INTENT, NCAA.ORG, at <http://www.ncaa.org/eligibility/cbsa/letterofintent.html> (last visited Nov. 23, 2004) [hereinafter *Student-athlete Guide*].

140. *Id.*

promises and the recruiting process.¹⁴¹

While not without problems, the NLI system does provide the recruiting process with important benefits. The signing of a NLI by a recruit stops the recruiting process, which is good for both the institution and the prospect.¹⁴² The purpose of the NLI is to provide certainty in the recruiting process, as well as to reduce recruiting time and expense for the institution and limit recruiting pressure for the player.¹⁴³

Institutions spend large amounts of money during the recruiting process both in bringing prospects in to visit campus and in sending coaches out on scouting and recruiting visits. The signing of an NLI allows the institution to save time and money because the recruiting process ends earlier and binds the prospect to one of its available scholarships. It also prevents an institution from trying to recruit an athlete away from another institution.¹⁴⁴ Once the athlete signs the NLI, he or she will have to sit out for two years and lose two seasons of competition if he or she breaks it.¹⁴⁵

Making a decision allows the recruit to refocus on finishing his or her high school career and preparing for college. For the athlete, the recruiting process can be lengthy and can create a lot of pressure on the athlete to choose an institution, particularly on high-profile recruits.¹⁴⁶ While many would consider being offered college scholarships from several institutions to be a perk rather than a problem, the recruiting process puts a lot of pressure on someone who is only seventeen or eighteen years old. One highly-touted recruit, Malik Hairston of Detroit, said, "[s]ometimes it gets to be a little too much . . . but even when it is, I have to suck it up and take it. You have to take the bitter with the sweet."¹⁴⁷ The purpose of the NLI system is important to both the athlete and the institution, but in order to work properly, the system requires some changes to keep up with changing college athletics.

Changing the system will make it more equitable and still maintain the purpose and most of the advantages of the NLI system. The NLI website lists what it considers to be the advantages to the prospect and the institution.

Once a National Letter of Intent is signed, prospective student-athletes are

141. NCAA, FREQUENTLY-ASKED QUESTIONS ON THE NATIONAL LETTER OF INTENT/FINANCIAL AID, NCAA.ORG, at http://www1.ncaa.org/membership/membership_svcs/eligibility-recruiting/faqs/nli_financial_aid.html (last visited Nov. 23, 2004) [hereinafter *NCAA Eligibility FAQ*].

142. *NLI Text*, *supra* note 1.

143. *NLI Overview*, *supra* note 3.

144. *NLI Text*, *supra* note 1.

145. *Id.*

146. See Diprimio, *supra* note 6.

147. *Id.*

no longer subject to further recruiting contacts and calls.

Student-athletes are assured of an athletics scholarship for one full academic year. (If not for the National Letter of Intent program, a student could find his or her scholarship taken by a more highly recruited student only weeks or days before classes begin.)

Institutions can be certain that once the student-athlete has signed a Letter of Intent, there is no need to continue recruiting for that position. (Without the program, last-minute changes by student-athletes could open scholarships and positions on teams.)

By emphasizing student-athletes' commitments to educational institutions, not particular coaches or teams, the program focuses university athletics on educational objectives. The program promotes student-athletes' academic objectives and helps to sustain the amateur nature of college sports.¹⁴⁸

These advantages are very important to the recruiting process. Therefore, the process would be better served by a reformed NLI system that makes the system more equitable than by continuing with the current system or scrapping it completely.

A. Administration

One of the problems with the NLI is that it is administered by the CCA through the SEC, rather than by the NCAA.¹⁴⁹ Bill Saum, an NCAA official, has said, "[w]e have nothing to do with the national letter of intent . . . As far as whether or not an athlete should sign, he has to do what is best for him."¹⁵⁰ This approach taken by the NCAA does not adequately address the needs of the recruiting process. With fifty-six conferences participating in the NLI program, the vast majority of college recruits receiving athletic financial aid go through the NLI system.¹⁵¹ Therefore, the NCAA needs to take more accountability for the process.

The *NCAA Guide for the College-Bound Student-Athlete* provides little information on the NLI other than signing period dates and a link to the website for the NLI.¹⁵² This guide should be modified to tell prospects exactly what they are and are not agreeing to when they sign the NLI and what is not being promised to them. Likewise, more information can be given in the

148. *NLI Overview*, *supra* note 3.

149. *NLI History*, *supra* note 7.

150. See Diprimio, *supra* note 6 (Saum is the Director of Agent, Gambling and Amateurism Activities).

151. *NLI Conferences*, *supra* note 5.

152. *Student-athlete Guide*, *supra* note 139.

"Frequently-Asked Questions" section of the NCAA website dealing with the NLI.¹⁵³ The NLI website also gives no information on what promises can be enforced and what promises cannot.¹⁵⁴ Despite this, the NCAA punishes the athlete with the loss of one or two seasons of eligibility for transferring to an environment he or she believes will better suit them or for breaking the NLI.¹⁵⁵ If athletes are to be punished under NCAA rules, then the NCAA has an obligation to administer the program or, at the very least, to oversee it.

Having the NLI system administered by the NCAA will provide several benefits. First, there will be only one place the prospect has to go to get all the information, not two. The rest of the recruiting process, including the Initial-Eligibility Clearinghouse, is run by the NCAA.¹⁵⁶ Prospects go to the NCAA for information regarding the recruiting process, which is why the NCAA puts together a guide for them.¹⁵⁷ The recruiting process can be stressful and confusing enough. By running the program through the NCAA, the prospect will have an easier time navigating the recruiting process and the rules regarding it. The NCAA is also in a better position to provide additional information to the prospects. The NCAA is looked to by prospects and parents to provide all the information concerning the recruiting process, what can and cannot be done during the recruiting process, and what promises can be enforced. Currently, the information available is not sufficient. Finally, by administering the program itself, the NCAA will achieve greater consistency with the rules. If the recruit is going to be punished for NCAA rules violations, the NCAA should not be taking such a hands-off approach.

B. Revising the Contract

The text of the NLI also needs to be revised. The current standard form does not allow institutions and athletes to bargain, make changes, or adapt it to their needs. If the prospect is contracting with the institution, he or she should be allowed to truly bargain during the recruiting process. While institutions would not necessarily benefit from a bargained-for contract, it would make the system more equitable. The prospect and the institution should be allowed to enter into additional contracts for promises made during the process. No

153. *NCAA Eligibility FAQ*, *supra* note 141.

154. *NLI Text*, *supra* note 1.

155. *See NLI Text*, *supra* note 1.

156. All recruits must go through the NCAA Initial-Eligibility Clearinghouse to certify that they have met the requirements and are eligible for NCAA athletics. *See NCAA, NCAA Initial-Eligibility Clearinghouse*, NCAA.ORG, at <http://www.ncaa.org/mailbox/clearinghouse.html> (last visited Nov. 23, 2004).

157. *Student-athlete Guide*, *supra* note 139.

contracts could be entered into for additional financial benefits or for those things that would be violations of NCAA rules.¹⁵⁸ If a coach recruits a player by promising that he or she will get four years, be a starting player, or play so many minutes a game, then the player should be able to get that in writing. Once the promises are in writing, it will be easier for the athlete to enforce them. This will hopefully induce coaches not to make promises such as these because they generate the possibility of the creation of multi-year contracts, instead of the current one-year NLI.

Admittedly, several problems would exist with this system. Coaches would be making contracts with players having no idea how the athlete will play in college. Athletes will also not be on an equal footing with one another and not have equal opportunity to compete for positions, playing time, or opportunities. The recruiting process could become more complicated with prospects bargaining over items such as playing time, positions, and their position on the depth chart or a multitude of other options. However, none of these problems would exist if the coach does not make the promises. The system will work much better if coaches do not make the kinds of promises that they cannot follow through on, whether they are like Erickson and make on-the-field promises¹⁵⁹ or like Bliss and make promises that would violate NCAA rules.¹⁶⁰ If it does not work out to their satisfaction, the coach or institution can break these promises, but the athlete would then be able to recover for damages.

C. Allowing the Athlete Out When the Coach Leaves

By binding an incoming student-athlete to the NLI and the institution when a coach leaves, the system is being unfair to the interests of both the student and the incoming coach. Most of the top high school basketball players sign their NLI during the early signing period in November.¹⁶¹ Meanwhile, most basketball coaches do not get fired, resign, or announce their retirement until after their season ends, usually in March.¹⁶² The student is bound to a program that might not be the best fit for their skills and talents. The incoming coach is bound to a recruiting class he or she did not recruit. Every coach has his or her own style or philosophy of how to best run a program. The prospects

158. DIVISION I MANUAL, *supra* note 54, at 100, Bylaw 13.2.

159. *Fortay*, 1994 WL 62319, at *3-4.

160. See Blackistone, *supra* note 87.

161. *NLI Signing Dates*, *supra* note 15.

162. The 2004 NCAA Men's Basketball Tournament ended on April 5, 2004. NCAA Sports, *Men's Basketball: Division I Scoreboard*, NCAASPORTS.COM, at <http://www.ncaasports.com/basketball/mens/scoreboard/madness/20040405> (last visited Nov. 23, 2004).

signed to an NLI by the coach's predecessor might not fit well into the new coach's philosophy. Requiring enforcement against a recruit of an NLI when the coach leaves might force the recruit into a program that is not beneficial to him or her or might force a coach to try to fit a player in that is not right for the new system.

To correct this situation, all incoming recruits should be allowed a limited release from their contractual obligations, without penalty, if the head coach that recruited them leaves the university. Any recruit who has signed with an institution and the coach subsequently leaves the institution before the athlete enrolls should not be bound by the NLI. However, this release from obligation will be limited. The recruit should be given thirty days from the end of the coach's tenure to sign an NLI with a new institution. These athletes then would be allowed to sign a new NLI out of the designated signing periods. Because of its superior bargaining position, the original institution would be bound by the NLI and financial aid offer given to the recruit. Therefore, the revised paragraph 19 of the NLI should say

I understand I have signed this NLI with the institution and not for a particular sport or individual. If the coach leaves the institution or the sports program before I enroll at the institution, I will be given 30 days from the time the coach is fired, resigns, or retires. During those 30 days, I will be allowed to be recruited by other institutions and to sign a new Letter of Intent, without penalty. If I do not do so within 30 days, I will remain bound to the institution with whom I signed my original Letter of Intent.¹⁶³

The prospect will have only thirty days to keep the recruiting period short, thus saving recruiting institutions from spending too much additional money and from putting too much additional pressure on prospects. This period will allow the new coach at the institution to have an opportunity to talk to the players and attempt to keep them. This system will still present the same advantages as the old system while presenting new ones.¹⁶⁴ The short time frame allows the prospect to keep the recruiting process at a minimum, but gives the recruit the opportunity to evaluate his or her situation. Once the prospect signs a new NLI, the recruiting process will once again cease. Once a new NLI is signed, the prospect will still be assured of an athletics scholarship for one year, and the institution will have the student bound by contract. This revised system will allow the prospect to choose the best athletic and educational environment.

Allowing recruits to be released will allow them the freedom to make an informed choice. When the athlete first committed to the university, a variety

163. Compare with *NLI Text*, *supra* note 1.

164. *NLI Overview*, *supra* note 3.

of factors might have weighed in the decision. Prospects might choose an institution because of its location, the storied history of the program, the coach's success in grooming players for professional leagues, the style of play, or even because of the institution itself. With the recruiting coach no longer at the institution, some of these factors might no longer exist. If Fortay had been permitted to leave Miami as he initially requested when Dennis Erickson took over as coach, perhaps he would have ended up at a school that was a better fit for him and three years of litigation would have been avoided.¹⁶⁵ A prospect should be given the opportunity to make the same kind of informed decision that he or she did when the NLI was first signed.

VI. CONCLUSION

As the Brian Fortay and Chad Elsey situations and Roy Williams's departure from Kansas demonstrate, the current NLI system is not fair to recruits. Unequal bargaining power exists in the relationship between recruits and the universities recruiting them. High-profile college football coaching departures have already been announced for the 2005 season at Illinois, Florida, and South Carolina.¹⁶⁶ These changes are just some of the latest in the revolving door of the college coaching ranks. With the unequal bargaining power and continuous changing of coaches, players will continue to encounter situations of unfulfilled promises and play for a different coach than the one that recruited them.

This comment proposed changes to the current NLI system. These changes would improve the system and help equalize the balance of power in the recruiting process. While these changes may not make the system perfect, the changes may have avoided Fortay being promised playing opportunities without any guarantees behind them, Elsey being promised things that would violate NCAA rules, and the players newly recruited by Williams being bound to the new coach. Implementing these changes in the NLI system would allow future recruits to avoid these situations and to make truly informed decisions.

Stacey Meyer

165. *Fortay*, 1994 WL 62319, at *4.

166. ESPN, *Division I-A Coaching Changes*, ESPN.COM, at <http://sports.espn.go.com/ncf/news/story?id=1925368> (Nov. 23, 2004) (Ron Turner and Ron Zook have both been fired from Illinois and Florida, respectively, and Steve Spurrier will replace Lou Holtz at South Carolina.).

